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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 80

FRANCIS E. VAN DUSEN, UNITED STATES DISTRICT JUDGE, ET AL., PETITIONERS

v.

ROBERTA BARRACK, ADMINISTRATRIX, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS[1]

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 1–20) is reported *sub nom. Popkin* v. *Eastern Air Lines, Inc.*, at 204 F. Supp. 426. The opinion of the court of appeals (R. 72–77) is reported at 309 F. 2d 953.

[1] This brief in No. 80 is being filed by the Solicitor General on behalf of the United States as defendant in the underlying actions and on behalf of Judge Van Dusen as defendant in the mandamus proceeding. A separate brief in No. 56, seeking reversal of the same judgment of the court of appeals, is being filed on behalf of Judge Van Dusen and the other defendants-intervenors (General Motors Corporation, Eastern Air Lines, Inc., and Lockheed Aircraft Corporation).

JURISDICTION

On December 7, 1962, the court of appeals, pursuant to its opinion of November 19, 1962 (R. 72–77), ordered the issuance of a writ of mandamus (R. 78–79). On December 14, 1962, the clerk of the court of appeals issued the peremptory writ of mandamus (R. 80–81), which was later stayed pending review in this Court (R. 93–94). On February 21, 1963, the court of appeals amended its opinion (R. 95–96). The petition for a writ of certiorari was granted on April 15, 1963 (R. 98). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Wrongful death actions were brought by decedents' personal representatives in the United States District Court for the Eastern District of Pennsylvania. The district judge found the District of Massachusetts to be a more convenient forum. The question presented is whether Section 1404(a) of the Judicial Code, authorizing transfer of a federal civil action to a more convenient district "where it might have been brought," is unavailable here to permit transfer to the District of Massachusetts because the plaintiffs, before commencing suit, had not obtained appointment as personal representatives in Massachusetts.

STATUTE INVOLVED

Section 1404(a) of the Judicial Code (28 U.S.C. 1404(a)) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may

transfer any civil action to any other district or division where it might have been brought.

STATEMENT

On October 4, 1960, a commercial airliner headed from Boston to Philadelphia crashed into Boston Harbor shortly after take-off from Logan International Airport in Boston. More than 150 actions for personal injury and wrongful death caused by the accident have been brought against the operator of the aircraft (Eastern Air Lines, Inc.), its manufacturer (Lockheed Aircraft Corporation), the manufacturer of the aircraft's engines (General Motors Corporation), the United States, and, in some cases, the Massachusetts Port Authority (which operated Logan Airport). More than 100 of these actions were brought in the United States District Court for the District of Massachusetts (R. 2). In addition, 40 actions for wrongful death and 5 suits for personal injuries arising out of the crash were begun in the United States District Court for the Eastern District of Pennsylvania.[2] This case concerns the 40 wrongful death actions brought in Pennsylvania. Essentially, plaintiffs in all the actions arising out of the disaster alleged that the negligence of all the defendants had caused the aircraft's engines to ingest some birds in flight, causing the aircraft to crash.[3]

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[2] Originally there were 55 actions in the Eastern District of Pennsylvania. Ten of these, however, were disposed of by remand to a state court, dismissal, settlement, or transfer for improper venue.

[3] Jurisdiction with respect to the corporate defendants was based on diversity of citizenship. Jurisdiction with respect to the United States was based on the Federal Tort Claims Act.

The defendants moved under 28 U.S.C. 1404(a) for transfer of all the Pennsylvania actions to the District of Massachusetts. After a thorough review of the facts relating to the relative convenience and justice of the two forums, the district judge (Van Dusen, J.) granted the motions for transfer (R. 4–20). Judge Van Dusen found that transfer to the situs of the accident, where most of the actions had been brought, would impose no serious burden on the plaintiffs, would significantly serve the convenience of most of the witnesses, and would advance the interests of justice by permitting consolidation of all cases arising from the same accident in a court familiar with the applicable law, thus conserving time, reducing expense and leading to uniform and consistent results. The District of Massachusetts, to which transfer was ordered, was a proper venue as to all the actions against all the defendants[4] and was a forum having jurisdiction over the person of all the defendants in all the actions. It was the only such jurisdiction.

The United States is charged with tort liability for the alleged negligence of government air traffic controllers in permitting the aircraft to come into contact with the ingested birds. In addition, there are allegations that the government negligently certified as safe the type of aircraft involved, and negligently failed to maintain safe conditions at the Boston airport.

[4] As to the private defendants, the District of Massachusetts was a proper venue under 28 U.S.C. § 1391(a), (c). As to the United States, it was a proper venue under 28 U.S.C. § 1402(b), and as to the Massachusetts Port Authority, it was the only proper venue under 28 U.S.C. § 1391(a).

The district court rejected an argument made by some of the plaintiffs that, considerations of convenience and justice notwithstanding, transfers from Pennsylvania to Massachusetts could not be ordered pursuant to Section 1404(a) in instances where the plaintiffs had failed to qualify, in advance of suit, as Massachusetts administrators. The district judge held that, according to the "common sense approach" to Section 1404(a) required by this Court's decision in *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, these actions could be transferred to Massachusetts despite this failure (R. 19–20). He found that, under Massachusetts law, plaintiffs' lack of Massachusetts appointment was not a jurisdictional defect and could be cured by subsequent appointment should a defense be raised on that ground. The court held that, in any case, "the defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions" after transfer (R. 20).

Plaintiffs petitioned the Court of Appeals for the Third Circuit for writs of mandamus and prohibition to prevent the transfers (R. 22–48). That court granted the writ of mandamus with respect to 37[1] death actions in which the plaintiffs had not qualified as Massachusetts administrators before bringing suit in Pennsylvania (R. 84–92). The court of appeals recognized that venue and personal jurisdiction would

[1] The writ was not granted with respect to one action in which plaintiff had qualified as a Massachusetts administrator and two actions where venue was improper in the Eastern District of Pennsylvania (R. 77, 95–96).

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have been proper in Massachusetts, and acknowledged that appointment of the plaintiffs as Massachusetts administrators would "quite likely" be granted if sought by them. Nevertheless, it believed that it was compelled by this Court's decision in *Hoffman* v. *Blaski*, 363 U.S. 335, to decide that the District of Massachusetts was not a district where these suits "might have been brought", within the meaning of Section 1404(a) because each plaintiff lacking Massachusetts appointment did not have *"an unqualified right to bring suit* in the transferee forum [the District of Massachusetts] at the time he filed his original complaint" in the Eastern District of Pennsylvania (R. 75, 76, original emphasis).[*]

SUMMARY OF ARGUMENT

The court of appeals has prevented transfer of these actions to the District of Massachusetts because of plaintiffs' failure, before bringing suit in Pennsylvania, to qualify as Massachusetts administrators. The court held that Massachusetts was therefore not a district where the actions "might have been brought." This decision was wrong because the limitation in Section 1404(a) does not have reference to

[*] Plaintiffs also sought to overturn the district court order on the grounds (1) that, as a matter of law, transfer was precluded by the possibility that the Massachusetts court would apply a rule of substantive law (on the question of damages) different from that applicable in Pennsylvania, and (2) that, in any event, the district court abused the discretion conferred upon it by 28 U.S.C. 1404(a) in ordering transfer in the circumstances of these cases. The court of appeals declined to pass on these alternative arguments in light of its holding that the district court lacked the power to transfer these representative actions (R. 73).

conditions for bringing suit under state law, but was designed only to limit transfer to transferee districts designated by federal law as places where the action "may be brought." In this case the District of Massachusetts was designated in the applicable federal venue statutes as a place where the actions "might have been brought." The District of Massachusetts also had jurisdiction over the person of all the defendants and had jurisdiction over the subject matter. Therefore transfer was proper once it was found by the district court to be in the interests of convenience and justice. This Court's decision in *Hoffman* v. *Blaski*, 363 U.S. 335, is entirely consistent with this conclusion.

In addition, the court of appeals' decision conferred discriminatory power to select the forum upon the plaintiffs in these cases in violation of the decision in *Hoffman* v. *Blaski*. Under the court of appeals' decision the plaintiffs here had the power unilaterally to prevent transfer to a more convenient and proper federal venue simply by omitting to qualify to sue in Massachusetts, when they did not wish the District of Massachusetts to be the place of trial.

We also question whether mandamus was an appropriate remedy in this case. The doubts on this score which are suggested by *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, are greatly strengthened by the consideration that Congress has since provided an appellate remedy—the Interlocutory Appeals Act—which respondents failed to pursue. We do not urge, however, that the court of appeals lacked jurisdiction (in the fundamental sense

of that term) and that this Court is therefore required to set aside the writ of mandamus without considering the merits of the transfer issue.

ARGUMENT

INTRODUCTION

Section 1404(a) of the Judicial Code provides for transfer of federal civil actions from one district to another when transfer of venue would be "for the convenience of parties and witnesses, in the interest of justice." Its aim is to prevent the waste "of time, energy and money" and "to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, 26, 27. Transfer under the statute, however, may only be made to districts where the action "might have been brought." This is the third case which has come before this Court concerning the meaning of the statutory limitation, "where it might have been brought." The other two were *Hoffman* v. *Blaski*, 363 U.S. 335, prohibiting transfer because of the statutory limitation, and *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, permitting transfer despite the limitation.

The district court here has ordered 40 wrongful death actions arising out of a single airline disaster transferred to the District Court for the District of Massachusetts, where the crash occurred and where more than 100 actions arising from the crash have already been brought. After careful consideration Judge Van Dusen found, as the statute requires, that transfer would serve the interests of convenience and

justice. That finding is not in question on this petition. The court of appeals has held, however, that despite the interests of convenience and justice, this Court's decision in *Hoffman* v. *Blaski*, *supra*, required it to prohibit the transfers, and it has issued a writ of mandamus so directing the district judge. It is the view of the United States, speaking on its own behalf as a defendant in the underlying actions and representing the district judge against whom the writ of mandamus has been issued, that the statutory limitation does not prevent transfer in this case.

The decision of the court of appeals preventing tranfer turns to a large extent upon the posture of the case under state law. Although we contend that limitations imposed by state law are not ultimately relevant in determining "where it might have been brought," the argument of the case is advanced by summarizing the applicable state law and its relationship to each of the cases. Indeed, such a summary alone is enough to demonstrate the error of the court of appeals' decision.

The 40 death actions involved in this case were brought by personal representatives, only one of whom had formally qualified to act as a personal representative in Massachusetts when the suits were brought.[7] Under Massachusetts law, which would be applicable in the federal district court in Massachusetts in these cases,[8] the failure of an out-of-state personal representative to obtain appointment as a Massachusetts administrator before bringing a wrongful death action

[7] (R. 77)

[8] See Rule 17(b), F.R. Civil P.

under Massachusetts law would be subject to a potential defense on the ground of lack of capacity to sue.[9] However, even if the defense of lack of capacity is raised in time, an out-of-state representative plaintiff may save his action by obtaining subsequent appointment as a Massachusetts administrator.[10] Such a subsequent appointment relates back in time to the institution of the action.[11] Moreover, if the defense of lack of capacity is not raised in time it is waived,[12] and the court will not raise it on its own motion.[13] Therefore, had plaintiffs' death actions originally been brought in Masachusetts, defendants in this case would have had a defense on the ground of plaintiffs' failure to be appointed as Massachusetts administrators only if (1) the plaintiffs had not obtained Massachusetts appointment before bringing suit, (2) the defense were raised in time and (3) the plaintiffs failed to obtain Massachusetts appointment after being met with the defense. Appointment as a Massachusetts administrator, if sought originally or if required by defendants' objection, would technically be in the discretion of the Massachusetts probate court.[14]

Plaintiffs, however, did not originally sue in Massachusetts, but in Pennsylvania. Therefore, they did not seek Massachusetts appointment before bringing

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[9] *Boutillier* v. *Wesinger*, 322 Mass. 495.

[10] *Boudreau* v. *New England Transp. Co.*, 315 Mass. 423.

[11] *Id.* at pp. 426–427.

[12] *Id.* at pp. 425–426; *Boutillier* v. *Wesinger*, *supra*; Ann. Laws of Mass. c. 231 § 30.

[13] *Budreau* v. *New England Transp. Co.*, *supra*; *Boutillier* v. *Wesinger*, *supra*.

[14] See *Morgan* v. *Morgan*, 267 Mass. 388.

their suits. Nor did they seek Massachusetts appointment when defendants moved for transfer to Massachusetts, which plaintiffs opposed. Nevertheless, the court of appeals has held plaintiffs' failure to obtain Massachusetts appointment before bringing these suits in Pennsylvania to be fatal to transfer under Section 1404(a). Under the court of appeals' interpretation of the statute, the District Court of Massachusetts was not a district where these actions "might have been brought," because, under Massachusetts law technically placing plaintiffs' capacity to sue in the discretion of the probate court, each plaintiff did not have *"an unqualified right to bring suit* in the transferee forum at the time he filed his original complaint."[15] The court of appeals believed this rule to be required by this Court's decision in *Hoffman* v. *Blaski*, 363 U.S. 335.

The court of appeals found no reason to suppose that all the plaintiffs could not in fact have obtained Massachusetts appointment had they wished to bring suit in Massachusetts. There is no indication in the record that Massachusetts appointment had been denied to any plaintiff, nor is any reason given why appointment would be denied. In its opinion the court of appeals said, "Of course, it is quite likely that most of these petitioners would have been so ap-

[15] R. 75. The court of appeals apparently derived this test from the court's statement in *Hoffman* that "Inasmuch as the respondents (plaintiffs) did not have a right to bring these actions in the respective transferee districts, it follows that the judgments of the Court of Appeals [prohibiting transfer] were correct * * *" (363 U.S. at 344). As we show *infra*, pp. 13–22, the court's reference in *Hoffman* was to a "right" under federal venue provisions, not to an "unqualified right" under state law.

pointed."[16] Moreover, the fact is that in none of these cases can a failure to obtain Massachusetts appointment actually prevent the action from going forward in Massachusetts after transfer, for in granting defendants' motion to transfer Judge Van Dusen estopped defendants from later objecting to the capacity of the plaintiffs to sue in Massachusetts, thus making plaintiffs' possible failure to obtain Massachusetts appointment wholly irrelevant to the conduct of the litigation after transfer.

To summarize, transfer has thus been prohibited because of plaintiffs' failure to qualify to sue in Massachusetts before actually suing in Pennsylvania. The failure to obtain Massachusetts appointment concededly cannot now have any effect whatsoever upon the conduct of the transferred litigation. It is the position of the United States that the words of Section 1404(a) obviously should not and in fact do not absolutely prohibit transfer in those circumstances. We agree, that, as the court of appeals held, the words, "where it might have been brought," have reference to a situation "at the time [plaintiff] filed his original complaint." But we will show that the limitation is a reference, not to qualifying provisions of state law, but to places designated as appropriate venues by the federal venue statutes. That is, the limitation in Section 1404(a) is a federal venue limitation and the words, "where it might have been brought," permit transfer to districts designated by federal venue statutes at the time of suit as places where such an action "may be brought." Under the applicable federal venue statutes, all of these

[16] R. 76.

actions originally "might have been brought" in the District Court of Massachusetts." The District Court of Massachusetts is therefore a place to which these actions may now be transferred under Section 1404(a).

This interpretation does not mean that a possibility that some plaintiffs might be denied Massachusetts appointment should have been ignored in Judge Van Dusen's decision whether or not to transfer these cases, and it was not ignored. Although irrelevant to whether the actions "might have been brought" in Massachusetts, a state law under which plaintiffs might not have the capacity to go forward with the action in Massachusetts after transfer would be relevant to whether transfer would be consistent with "the convenience of the parties * * * [and] the interest of justice." Judge Van Dusen, however, fully satisfied the interest of justice in this case by holding that the defendants, by requesting transfer to Massachusetts, were thereafter estopped from objecting to the plaintiff's capacity to sue there.[18] Provisions of state law [redacted] do not absolutely prohibit transfer when the interests of justice can thus be satisfied.

I

"WHERE IT MIGHT HAVE BEEN BROUGHT" HAS REFERENCE TO THOSE DISTRICTS IN WHICH CONGRESS HAS PROVIDED THE ACTION "MAY BE BROUGHT." THE PHRASE DOES NOT HAVE REFERENCE TO STATE LAW

The meaning of the limitation, "where it might have been brought," appears from the history of the

[17] See note 4, *supra*.

[18] (R. 20.) See *supra*, p. 5.

transfer statute, its function, and this Court's decisions. Section 1404(a) was first enacted as part of the 1948 Judicial Code. According to the Reviser's Note, the Section "was drafted in accordance with the doctrine of *forum non conveniens.*" Under that judicially evolved doctrine an action brought in an inconvenient, rather than a more convenient, forum might be dismissed to be reinstituted in the more convenient forum. In applying *forum non conveniens* it was important whether the action, if dismissed, could be brought anew in another forum. If it could not, application of the doctrine might result in the plaintiff's losing his cause of action altogether. As this Court thus said in a leading *forum non conveniens* case before the enactment of Section 1404(a), "[i]n all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 506–507."

When the enactment of Section 1404(a) changed the *forum non conveniens* remedy from dismissal to transfer, there was no need for Congress to be con-

[19] In order to permit invocation of the doctrine of *forum non conveniens* while avoiding injustice to a plaintiff forced originally to bring his suit in an inconvenient forum by his inability to serve defendant elsewhere, it was, in fact, not unusual for the inconvenient court to dismiss only upon the condition that the defendant voluntarily submit himself to the jurisdiction of the more convenient forum. See cases cited in Mr. Justice Frankfurter's dissenting opinion in *Sullivan* v. *Behimer,* 363 U.S. 351, at 364–365.

cerned, as the courts had formerly been, with whether the plaintiff could formally reinstitute his action in the transferee forum after transfer. A transferred action could proceed immediately in the transferee forum without being brought a second time. Therefore, it is plain, and no one now disputes, that the statutory limitation, "where it might have been brought," does not have reference to whether the plaintiff could reinstitute his action in the transferee forum at the time of transfer. This Court so held in *Hoffman* v. *Blaski*, 363 U.S. 335 at 342–343, adopting the view that the limitation focuses instead upon "'the situation which existed when suit was instituted.'" *Id.* at 343.

To be sure, there may be impediments to the plaintiffs' action going forward in the transferee forum at the time of transfer, which should be taken into account under Section 1404(a). For example, the proposed transferee forum might apply a principle of laches under which the transferred action would be barred there. Such a factor of state law, however, is to be considered in determining whether transfer would be "in the interest of justice," not whether the transferee district is a place where the action "might have been brought." The fact that the ability of the action to go forward in the transferee district after transfer does not determine whether it "might have been brought" there, was shown by *Hoffman* v. *Blaski*. There, even though the actions concededly could and would have gone forward in the transferee districts had transfer been permitted, the Court held those districts not to be places where the actions

"might have been brought" and therefore held transfer to be impermissible.

The nature of the limitation which the words "where it might have been brought" impose appears from the decisions of this Court in *Hoffman* v. *Blaski* and *Continental Grain Co.* v. *Barge FBL–585*, and from the statutory context of Section 1404(a). In the two cases decided *sub nom. Hoffman* v. *Blaski* the Court held that the statutory limitation prohibited transfer when the federal court to which transfer was proposed "lacked venue of the action and ability to command jurisdiction over the defendants" at the time where the suits were originally instituted. 363 U.S. at 337, 339. In *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, the Court held, on the other hand, that the limitation did not prohibit transfer of an *in rem* action in admiralty to a district where the *res* was not located so long as, at the time the action was brought, the transferee district court had venue of an action *in personam* against the owner of the *res* and the ability to command jurisdiction over his person. In each case the question the Court deemed determinative was whether the transferee district had been designated *by federal law regulating the place of trial* as an appropriate place for suit to be brought, thus giving the plaintiff a right to bring it there under federal law when he instituted suit.

This interpretation of the words, "where it might have been brought," as referring to those places which federal provisions specify as appropriate places for trial is confirmed by examination of the venue provisions of the United States Code. In the venue chapter

of the Judicial Code (Ch. 87, §§ 1391–1406) Congress repeatedly provides where actions of various types "may be brought,"[20] "prosecuted,"[21] or "instituted"[22] (or occasionally where they "must"[23] or "shall be brought"[24]). That is, Congress has designated limited statutory venue where a given action "may be brought." Had Congress omitted the limitation, "where it might have been brought," from the transfer-of-venue statute, these statutory venue provisions might have been totally superseded by the transfer remedy, for it would have been open to a district judge, without regard to whether the transferee forum was a designated statutory venue, to transfer a case to any district if he reasonably deemed trial there to be in the interests of "convenience" and "justice". By imposing a limitation of transfer to districts "where it might have been brought," Congress, however, showed that it wished transfer to operate within its general statutory venue provisions. The words thus limit the choice of federal forums to which transfer may be made to those designated as statutory venues by federal law.

For example, where federal jurisdiction is founded only on diversity of citizenship, 28 U.S.C., 1391(a) provides that the action "may * * * be brought only in the judicial district where all plaintiffs or all de-

[20] 28 U.S.C., Sections 1391(a), 1391(b), 1392(a), 1392(b), 1393(b), 1395(d), 1396, 1397, 1399, 1400(b).

[21] 28 U.S.C., Sections 1394, 1395(a), 1395(b), 1395(c), 1395(e), 1401, 1402(a), 1402(b).

[22] 28 U.S.C., Section 1400(a).

[23] 28 U.S.C., Sections 1393(a).

[24] 28 U.S.C., Sections 1398, 1403.

fendants reside." Suppose that all defendants in an action reside both in Vermont and Connecticut, that all plaintiffs reside in California, and that the action is originally brought in California. Without the limitation, "where it might have been brought," in Section 1404(a), transfer, if deemed in the interests of convenience and justice by the district judge, might be effected to *any* federal district court anywhere. The district judge might transfer to a district court in Montana, Virginia, or any other federal district court, regardless of Section 1391(a). The purpose of the restriction, "where it might have been brought," was to limit the potential places of transfer to Vermont or Connecticut, which are the only places besides California where the action "may be brought" under Section 1391(a). The potential places of transfer are thus co-extensive with the places where federal law originally provided the action "may be brought"; Section 1404(a) permits the district judge to choose among those places, and only those places, on the basis of convenience and justice. Since it is conceded in this case that the District Court of Massachusetts is a place where, under the applicable federal statutes regulating venue and jurisdiction over the person, these actions "might have been brought," it is a place to which transfer may be made under Section 1404(a)

[11] See Korbel, *The Law of Federal Venue and Choice of the Most Convenient Forum*, 15 Rutgers L. Rev. 607, 611 (1961): "[I]n substituting transfer for dismissal, the legislators felt obliged to develop a method for delimiting the permissible transferee courts. The simplest solution was to resort to that same law of venue and process which already served to delimit the permissible transferor courts." See, also, 1 Moore, *Federal*

upon a finding that the interests of convenience and justice will thereby be satisfied."

On the other hand, the decision of the court of appeals would limit the federal forums to which transfer might be made not only by federal venue provisions, but by numerous provisions of state law having nothing to do with federal venue policy. In the present case there could be no transfer to Massachusetts because of Massachusetts rules governing the capacity of a personal representative to sue. Pre-

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Practice, ¶ 0.145[6.-1], at p. 1789; 1 Barron & Holtzoff, *Federal Practice and Procedure* (1962 Pocket Part), § 86.2.

It is not wholly clear from the decision in *Hoffman* v. *Blaski* whether transfer will be denied if the transferee district is a statutory venue but lacked jurisdiction over the defendant's person at the time suit was instituted. Some of the restrictions on personal jurisdiction might be deemed federal restrictions on the place of trial, making it a fair conclusion that the words "where it might have been brought" have reference to the jurisdiction as well as venue provisions of federal law. In *Hoffman* both venue and personal jurisdiction were missing: so the question was not necessarily resolved. A rule holding personal jurisdiction in the transferee forum at the time of the original suit, in addition to venue, to be necessary for transfer would cause some difficulty in administration. An important and traditional foundation of personal jurisdiction in the federal courts is personal service upon the defendant within the state where the court sits, regardless of his permanent residence. (See Rule 4(d)(1) and (f), F.R. Civ. Proc.) If personal jurisdiction in the transferee district at the time of original suit is relevant to transfer, that may entail difficult collateral investigations into the whereabouts of the defendant at the time of the original complaint. (See dissenting opinion of Mr. Justice Frankfurter in *Hoffman* v. *Blaski*). However, it is unnecessary to decide that issue here, since it is clear that in this case the transferee forum had personal jurisdiction over all defendants at the time of suit, as it is clear it was a designated federal venue at that time.

sumably, the same reasoning would completely bar transfer in a large number of cases brought by other types of fiduciaries who have not qualified to sue in the transferee districts. It would also prohibit transfer in numerous other situations, for example, where the applicable state law of the proposed transferee forum imposes a requirement that a bond be posted [11] or an appointment of an agent to receive process be made [12] as a condition of bringing suit. If plaintiff has not posted the bond or appointed the agent *at the time he originally brings suit* in another forum, transfer would forever become impossible under the court of appeals' decision here. This would be true even though the bond might well be posted or the agent appointed by the time of the transfer motion or, as in this case, the defendant might waive the requirement by that time, thus making posting or filing unnecessary under state law. The consequence would be that such state rules would bar transfer even though they would have absolutely no effect upon the case. There is no apparent reason why state law which does not reflect federal venue policy and which can have no substantive effect upon the litigation should thus govern the place of trial in the federal courts.

Hoffman v. *Blaski* does not remotely require this result. In that case requirements of state law played no part in the Court's decision. Transfer was prohibited in *Hoffman* because, under the applicable *federal provisions regulating the place of trial*, the

[11] See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541.

[12] See *Woods* v. *Interstate Realty Co.*, 337 U.S. 535.

transferee districts were not places where the actions "might have been brought." They were not places where the applicable venue statutes in the Judicial Code provided such actions "may be brought," nor was there jurisdiction over the persons of the defendants under the applicable rules governing the *in personam* jurisdiction of the federal courts. On the other hand, *Continental Grain Co.* v. *Barge FBL-585, supra,* suggests a result directly contrary to what the court of appeals has here decided. In that case, the place of transfer was a place where an action might have been brought *in personam* against the owner of a barge under the applicable federal venue and personal jurisdiction provisions. It was urged, however, that since the action to be transferred was in part an action *in rem* in admiralty against the barge, transfer could not be made because the transferee district did not have power over the *res*. The Court held that since the issues in the *in rem* and *in personam* action would be the same, the fiction of an *in rem* action would not prevent transfer when "the practical economic fact of the matter" was that exactly the same relief could be obtained in the *in personam* action as in the *in rem* action. 364 U.S. at 26. The *in rem* fiction could not determine where the action "might have been brought." As the Court said, "To construe § 1404(a) this way merely carries out its design to protect litigants, witnesses and the public against unnecessary inconvenience and expense, not to provide a shelter for *in rem* admiralty proceedings in costly and inconvenient forums." 364 U.S. at 27. In the present case, Section 1404(a)

similarly should not provide a shelter for representative wrongful death proceedings in costly and inconvenient forums.

In summary, when Congress provided for transfer to districts where the action "might have been brought," it authorized transfer to districts where, under federal law, the action "may be brought," if the interests of convenience and justice so require. The limitation has nothing to do with whether trial can actually go forward under state law, but refers only to federal limitations upon the place of trial. If applicable state law provides a real impediment to the progress of the action in the transferee forum, transfer would offend the "interest of justice" and be inappropriate for that reason.[20] But state law with no substantive application to the case cannot absolutely frustrate the just transfer of a federal action to a place deemed appropriate for trial by federal law.[21]

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[20] Thus, under the logic of our argument, if Massachusetts absolutely prohibited a resident of another state from bringing a wrongful death action in a representative capacity, and if this were a "jurisdictional" matter which the Massachusetts court would raise on its own motion, the District Court of Massachusetts would nevertheless be a district where these actions "might have been brought," for it would remain a place which was designated by federal law as a place where the actions "may be brought." Presumably, however, unless some way could be found to bring the death action in Massachusetts in such a case (such as appointment of a Massachusetts resident as administrator for the purposes of the lawsuit) transfer should not be made as offending the interest of justice.

[21] We have found only one other decision in a lower court agreeing with the court of appeals in this case that plaintiff's failure to obtain representative capacity under the state law applicable in the transferee forum absolutely precluded transfer on the ground that the transferee forum was not a district "where it might have been brought." See *Felchlin* v. *American*

II

THE COURT OF APPEALS' DECISION CONFERS UPON PLAINTIFFS IN THIS CASE DISCRIMINATORY POWER TO SELECT THE FORUM, CONTRARY TO THIS COURT'S DECISION IN *HOFFMAN* V. *BLASKI*

Not only does the decision of the court of appeals make transfer here impossible because of an improper reference to state law, but its decision placed it solely within the power of the plaintiffs in the circumstances of this case to control the possibility of transfer. This result is contrary to this Court's admonition in *Hoffman* v. *Blaski*, 363 U.S. 335, 344, against "gross discrimination" in the application of Section 1404(a).

In *Hoffman* v. *Blaski*, the transferee districts were not ones designated by the applicable federal venue statutes as districts where the actions "may be brought," nor were they districts having unconsented jurisdiction over defendants' persons. The Court therefore prohibited transfer. The defendants, however, had argued that they were willing to waive their objections based upon lack of federal venue and personal jurisdiction in the transferee forum, so that

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Smelting & Refining Co., 136 F. Supp. 577 (S.D. Calif.). The *Felchlin* case was decided before this Court's decision in *Hoffman* v. *Blaski*. On the other hand, several lower court decisions have placed no reliance upon plaintiff's representative capacity or lack thereof in the transferee district in determining the propriety of transfer under Section 1404(a). *E.g.*, *Quinn* v. *Simonds Abrasive Co.*, 199 F. 2d 416 (C.A. 3), certiorari denied, 345 U.S. 964 (transfer denied); *Huff* v. *Nashville C. & St. L. Ry.*, 88 F. Supp. 735 (S.D. N.Y.) (transfer granted); *Leppard* v. *Jordan's Truck Line*, 111 F. Supp. 811, 816 (E.D. S.C.) (transfer granted).

transfer could be accomplished."[20] The Court rejected the effectiveness of the proffered waivers. Although the Court recognized that, as a general proposition, "venue, like jurisdiction over the person, may be waived" 363 U.S. at 343, it held that to give effect to such waivers for purposes of the transfer statute would be to confer upon defendants, as a class, discriminatory powers of forum selection, 363 U.S. at 344:

> The thesis urged by petitioners would not only do violence to the plain words of § 1404(a),

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[20] There may, on the surface, seem to be similarity between defendants' proferred waivers of venue and jurisdiction in *Hoffman* and defendants' waivers of their potential objections to plaintiffs' lack of Massachusetts capacity here. The court of appeals seems to have relied on the similarity (R. 75). In fact, however, the waivers are totally different in effect. Although, under federal venue practice, a defendant may "waive" his venue objection by not raising it if plaintiff brings suit in the wrong federal district (28 U.S.C. Section 1406(b)), that was not relevant in *Hoffman*, because plaintiffs there did not wish to bring suit in the transferee district, where defendants proferred their waiver. Venue provisions are meant to serve the interests of both the plaintiff and the defendant. If both agree upon an improper venue, the provisions do not prevent the action from going forward there. But in *Hoffman*, defendants sought through transfer to force plaintiffs into a venue where they did not consent to go forward with suit. Defendants' waivers could not thus deprive plaintiffs of their venue privilege. In this case, the Massachusetts rules regarding plaintiffs' capacity to sue cannot conceivably be thought to have been enacted for the benefit of plaintiffs, thus giving plaintiffs a privilege not to have suit go forward in the federal district court in Massachusetts. Therefore, acceptance of defendants' waivers of their potential capacity defense will not force plaintiffs into a federal forum where plaintiffs have any statutory privilege to prevent trial. On the contrary, the federal venue statutes designate Massachusetts as a proper place for trial of these actions.

but would also inject gross discrimination. That thesis, if adopted, would empower a District Court, upon a finding of convenience, to transfer an action to any district desired by the *defendants* and in which they were willing to waive their statutory defenses as to venue and jurisdiction over their persons, regardless of the fact that such transferee district was not one in which the action "might have been brought" by the plaintiff. Conversely, that thesis would not permit the court, upon motion of the *plaintiffs* and a like showing of convenience, to transfer the action to the same district, without the consent and waiver of venue and personal jurisdiction defenses by the defendants. Nothing in § 1404(a), or in its legislative history, suggests such a unilateral objective and we should not, under the guise of interpretation, ascribe to Congress any such discriminatory purpose.

Thus the Court held that Section 1404(a) must be read to preserve the relative powers of plaintiffs and defendants to determine the ultimate forum. A plaintiff's initial choice from among the forums designed by federal law may be overridden only when the defendant demonstrates that another of the designated forums is a more convenient and just place for trial. To allow the defendant to expand the available forums by consent would confer upon defendants a disparately great power in choosing the ultimate forum; it would "inject gross discrimination."

In this case, the court of appeals' decision would result in such discrimination, although here discriminatory powers of forum selection would be conferred upon plaintiffs rather than defendants. In *Hoffman*,

defendants were denied the power unilaterally to expand the number of available forums through discretionary waiver of the defenses of lack of venue and jurisdiction. But the decision below accords the representatives plaintiffs in these wrongful death actions a converse power unilaterally to contract the choice of available forums by simply refraining from qualifying in Massachusetts—a proper venue—when they wish to sue only in Pennsylvania. Section 1404(a) provides that the choice of venue upon a motion to transfer must be among venues where the action "might have been brought." From among these forums, the court is to choose the one best serving the interests of convenience and justice. Plaintiffs should not be able unilaterally to reduce these places "where it might have been brought" any more than defendants in *Hoffman* were held not to be able unilaterally to expand them. Federal law—neither the plaintiff nor defendant—determines whether a district is a place "where it might have been brought."

This power conferred on representative plaintiffs, in the circumstances of this case, by the decision below is, in fact, even more objectionable, under the *Hoffman* rationale, than the power denied defendants by the *Hoffman* decision. For even if defendants were allowed to expand the available forums by waiver of personal defenses, the exercise of that power would be tempered by the district court's ultimate discretionary power to deny improvident transfers as not according with "convenience" and "justice."[11] But the power

[11] See the dissenting opinion of Mr. Justice Frankfurter in *Sullivan* v. *Behimer*, 363 U.S. 335, 361–362.

enjoyed by the representative plaintiffs here to prevent transfer under the decision below is absolute and unchecked; once it is determined that the plaintiffs lacked representative qualification in the proposed transferee district at the time suit was instituted, the inquiry can go no further and the action is frozen in the forum chosen by the plaintiff, even though in this case it was quite likely that Massachusetts qualification could have been obtained.

If the decision below is allowed to stand, the beneficial purposes of the transfer statute will be therefore unavailable, at the discretion of plaintiffs, in all representatives death actions where plaintiffs have a choice whether or not to qualify in the proposed transferee district. Section 1404(a) should not thus be read to afford plaintiffs the power wholly to frustrate its purpose in this important type of litigation where transfer preeminently serves the interests of convenience and justice.

III

IN ADDITION, IT IS DOUBTFUL THAT A COURT OF APPEALS SHOULD RESORT TO ITS POWERS UNDER THE ALL WRITS ACT IN ORDER TO REVIEW A TRANSFER ORDER, WHEN THE COMPLAINING PARTY HAS FAILED TO PURSUE THE REMEDY PROVIDED BY THE INTERLOCUTORY APPEALS ACT

In our petition for a writ of certiorari, we reserved the right to argue that the court of appeals should not have reviewed the transfer order by way of mandamus and that respondents should have proceeded by seeking to invoke the Interlocutory Appeals Act, 28 U.S.C. 1292(b).[22] If this is so, it would not, of course,

[22] The text of the Act is as follows: "When a district judge, in making in a civil action an order not otherwise appealable

affect the jurisdiction of this Court to review the judgment of the court of appeals, which clearly had jurisdiction to consider an application for mandamus. It might, however, suggest that this Court should reverse the judgment below because an improper remedy was pursued, without reaching the merits of the district court's order of transfer. This difference in disposition of the case would be an important one from the standpoint of the significance of the Court's decision as a precedent.[*] We therefore set forth the reasons which, in our view, make it questionable whether mandamus is available in the situation posed by the case at bar.

This Court seems never to have explicitly approved the mandamus power of the courts of appeals as an appropriate means to review orders of transfer under Section 1404(a). In the two cases decided *sub nom. Hoffman* v. *Blaski*, the court of appeals, to be sure, had invoked the mandamus power in order to review

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under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

[*] In addition, a decision on the merits of the district court's order would also foreclose the possibility of attack upon the transfer order after entry of final judgment in the cause, whereas a holding that the transfer order was not reviewable at an interlocutory stage would not necessarily preclude such an attack.

transfer orders. The parties did not press the issue in this Court, however, and the Court did not discuss it. See 363 U.S. at 340. Moreover, in both of these cases the mandamus petitions were filed before passage of the Interlocutory Appeals Act.[24] In *Continental Grain Co.* v. *Barge FBL-585*, the party objecting to transfer had invoked the Interlocutory Appeals Act, and the appeal was certified by the district judge and accepted by the court of appeals pursuant to that Act. Again the Court did not discuss whether that was the appropriate means of seeking review.

One case decided by the Court in the past strongly suggests that mandamus is not an appropriate remedy, even without considering the availability of the Interlocutory Appeals Act. In *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, decided before passage of the Interlocutory Appeals Act, the Court decided that, in the circumstances of that case, mandamus was not an appropriate remedy to vacate a transfer order entered by a district judge under 28 U.S.C. 1406(a), another transfer provision of the Judicial Code. Section 1406(a) provides that when venue is laid in the wrong federal district, the district court shall dismiss, "or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Venue had been laid in the *Holland* case in the Southern District of Florida. Finding that district to be an improper venue, the district court

[24] The Act was effective on September 2, 1958. In one of the cases the petition for mandamus was filed prior to July 1, 1958. See 260 F. 2d 317 (C.A. 7). In the other case, the petition was filed on June 12, 1958. Transcript of Record, Supreme Court of the United States, October Term, 1959, No. 26.

ordered transfer under Section 1406(a) to the Northern District of Georgia. The plaintiff claimed that the district court had no "power" so to transfer because the defendant could be "found" in Florida and had "agents" there within the meaning of the applicable venue statute, and thus Florida was in fact a proper venue. Plaintiff therefore contended that Section 1406(a) did not apply and that his only immediate remedy for the improper transfer was mandamus. In holding mandamus improper, the Court first held that the district court's decision "even if erroneous * * * involved no abuse of judicial power." The Court assumed that the district court's decision that venue in Florida was improper "is reviewable upon appeal after final judgment" in Georgia. 346 U.S. at 381, 382. It then held the order of transfer to be an interlocutory order which was not subject to immediate review by way of mandamus, stating (346 U.S. at 383):

> In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" of the sort held to justify the writ in *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212, 217 (1945). This is not such a case.

If *Bankers Life & Casualty Co.* v. *Holland* applies to the present case, the court of appeals should not have issued the writ, and the district court's transfer

order must be reinstated for that reason. We turn therefore to a consideration of the question whether there are sound reasons for distinguishing *Holland*.

(1) A vital prop of the *Holland* case seems to have been the Court's assumption that the transfer order, if erroneous, was "reviewable upon appeal after final judgment." If the order of transfer had not been ultimately reviewable, the Court might have found mandamus an appropriate remedy in the circumstances, for otherwise a transfer order erroneous under Section 1406(a) would never be subject to appellate judicial review. Cf. *Leedom* v. *Kyne*, 358 U.S. 184.

In the present case, it is not clear that there would in fact be effective appellate review after final judgment of the validity of the district court's order under Section 1404(a), should review by way of mandamus now be denied. Should plaintiffs go to trial in the District of Massachusetts and lose there on the merits, it is quite possible that the transfer of the action from the District of Pennsylvania, even if technically erroneous, would amount at most to harmless error and thus not be cause for reversal. That, however, seems also to have been the situation in the *Holland* case, where there was no reason to suppose that trial in Georgia rather than Florida would have accounted for prejudicial error. The decision there may thus mean that transfer orders are reviewable only after final judgment and only if they ultimately result in harmful error affecting the final judgment (for example, if plaintiffs are unable to have a vital witness present in the transferee district, or if that district applies a rule of law affecting the outcome of the case,

which would not have been applied in the place where the suit originated). If so, this case would be reviewable only on the same terms.

(2) The theory of *Holland* may have been that the validity of transfer orders under Section 1406(a) is *always* reviewable after final judgment, regardless of whether the error in transfer is prejudicial, making mandamus unnecessary to insure ultimate review. The court of appeals case cited by the Court in *Holland* as authority for the proposition that review would take place after final judgment seems in fact to have held that there would be ultimate review regardless of prejudice. *Gulf Research & Development Co. v. Leahy,* 193 F. 2d 302, 304 (C.A. 3). There, the Third Circuit said that "if the order of transfer was erroneous all subsequent proceedings in the Delaware District Court are subject to that initial infirmity."

If an erroneous transfer order under Section 1406(a) is reviewable after final judgment regardless of prejudice, there is no reason to suppose that an erroneous order under Section 1404(a) does not similarly invalidate all subsequent proceedings—at least when the error, as in this case, is an error of law, and not merely an error in the exercise of discretion to decide whether transfer would serve the interests of convenience and justice. If mandamus was inappropriate in *Holland* because ultimate review was available, it would also be inappropriate here.

(3) The court of appeals in this case seems to have justified its use of mandamus because "the district court acted *without jurisdiction* in granting a motion to transfer under § 1404(a)" (R. 73; emphasis added). Even if mandamus is appropriate when the

district court exceeds its "jurisdiction," a holding that an erroneous transfer is such a jurisdictional error seems squarely contrary to the Court's holding in the *Holland* case. There, as here, it was asserted that the statute did not authorize the district court's transfer order, and that the district court therefore exceeded its "jurisdiction." In holding mandamus inappropriate, the Court said, 346 U.S. at 382:

> The contention is that in acting on the motion and ordering transfer he [the district judge] exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. The ruling on a question of law decisive of the issue presented by Cravey's [the defendant's] motion [to transfer] and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it [Citation omitted]. Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power * * *.

An error of law under Section 1404(a) seems no more a jurisdictional error than an error of law under Section 1406(a).

(4) The attack upon the district court's ruling in the *Holland* case seems to have been treated by this Court as "frivolous." (346 U.S. at 384; and see the dissenting opinion of Mr. Justice Frankfurter, 346 U.S. at 385). Although the Court did not directly rely upon the frivolity of the attack in holding mandamus inappropriate, it is conceivable that the result might have been different if a more serious legal

issue had been presented. Arguably, the supervisory power of the court of appeals would appropriately be called into play through mandamus in such a case to enable it to clarify the meaning of the statute for the guidance of other lower courts. Compare *Ex Parte Collett*, 337 U.S. 55, 72; *Kilpatrick* v. *Texas & Pacific R. Co.*, 337 U.S. 75; *United States* v. *National City Lines, Inc.*, 337 U.S. 78. The district court's ruling in this case is obviously not frivolous, and it might be deemed of sufficient general importance to justify a use of discretionary power.

(5) There has been a theory that mandamus is appropriate in transfer cases where a district court orders transfer to a district in another circuit, for such action "tends to frustrate or impede the ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other provision of the law." See Mr. Justice Brennan's dissenting opinion in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 264–266, referring to Chief Judge Magruder's comprehensive opinion in *In Re Josephson*, 218 F. 2d 174 (C.A. 1). This theory might be used to explain the holding in *Holland*, for there transfer was ordered from Florida to Georgia, districts both within the same circuit. The Court in *Holland* did not suggest, however, that the result turned upon the fact that transfer had been ordered to a place within the same circuit—a point not mentioned in the Court's opinion. Moreover, it would seem incongruous, especially in the presence of nationally applicable legislation governing interlocutory appeals, to make transfer orders reviewable or not solely depending upon whether they result in

transfer between two circuits, rather than in transfer wholly within one circuit, when such a factor has no other effect upon the course of the litigation.

In summary, the decision of the court of appeals to act by way of mandamus in this case was doubtful, even without consideration of the availability of the Interlocutory Appeals Act. Mandamus is probably not generally applicable to correct alleged errors—even errors of law—resulting in transfer under Section 1404(a), but the precedents do not exclude the possibility that it may be available in exceptional instances. Allowing for that possibility, we still suggest that, at least in the first instance, the complaining party should now be required to seek appellate review under the Interlocutory Appeals Act, a statute designed to afford review of interlocutory orders in exceptional circumstances and one which appears plainly applicable to interlocutory transfer orders, at least when the disputed issue is one of law. At least five decisions in at least three different courts of appeals have found the Act to be applicable to review transfer orders,[35] and the Report of the House Committee on the Judiciary on the Interlocutory Appeals Act lists transfer orders as one of the categories of orders appealable under the Act.[36] The use of the

[35] *Continental Grain Co.* v. *Barge FBL–585*, 268 F. 2d 240 (C.A. 5); *Ex Parte Deepwater Exploration Co.*, 260 F. 2d 546, 547 (C.A. 5); *Allstate Ins. Co.* v. *United States District Court*, 264 F. 2d 38 (C.A. 6); *Panhandle Eastern Pipe Line Co.* v. *Thornton*, 267 F. 2d 459 (C.A. 6); *Goldlawr, Inc.* v. *Heiman*, 288 F. 2d 579 (C.A. 2).

[36] H. Rep. No. 1667, 85th Cong., 2d Sess., pp. 1–2. See also Hearings on H.R. 6238 before Subcommittee No. 3 of the House

Act as the primary remedy to review orders of transfer will prevent litigants objecting to transfer from automatically invoking the court of appeals' consideration, thus causing delay in the progress of the litigation. Transfer orders are made in the interest of the just expedition of litigation and, in general, they ought to become effective without opportunity to request immediate appellate review. Use of the Interlocutory Appeals Act as the remedy for allegedly erroneous transfer orders would also appropriately preserve the quality of mandamus as an extraordinary writ, whereas its use as the ordinary means to review all transfer orders under Section 1404(a) will soon destroy the extraordinary character of the writ.

We would conclude, therefore, that the court of appeals should not have invoked its mandamus power in this case. The plaintiffs' remedy lay under the Interlocutory Appeals Act, and mandamus was appropriate, if at all, only upon an abuse of discretion in the application of that Act. However, we recognize that this Court has not previously held that the Act is the proper way in which to seek review of transfer orders, and, in *Hoffman* v. *Blaski*, the Court did review court of appeals' decisions in transfer cases made through exercise of the mandamus power. Moreover, even if the Court should adopt the view which we urge—that the complaining party should seek review of transfer orders under the Interlocu-

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Committee on the Judiciary, 85th Cong., 2d Sess., pp. 8–9 (Testimony of Chief Judge Parker); *Deepwater Exploration Co.* v. *Andrew Weir Ins. Co.*, 167 F. Supp. 185, 187–188 (E.D. La.).

tory Appeals Act—the Court might still conclude that a misuse of the mandamus power is not equivalent to a fundamental lack of jurisdiction in a court of appeals and that it would therefore be appropriate to consider in this instance the merits of the district court's order.

In short, while we do not contend that the Court is required by jurisdictional considerations to set aside the writ of mandamus issued below and do not seek to foreclose consideration of the underlying issues involving the proper interpretation of Section 1404 (a), we have concluded that we should invite attention to the significant procedural issue involved. We also suggest that it would be appropriate for the Court to indicate that mandamus is no longer to be considered the primary or ordinary avenue for seeking review of transfer orders.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be reversed and the district court's order of transfer reinstated.

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AUGUST 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963